UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v

STATE OF COLORADO, COLORADO DEPARTMENT OF HEALTH,

Defendants - Appellants.

No. 91-1360

THE STATE OF ALASKA, STATE OF ARKANSAS, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF INDIANA, STATE OF IOWA, STATE OF KANSAS, STATE OF KENTUCKY, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF MISSOURI, STATE OF NEBRASKA, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF NEW YORK, STATE OF NORTH CAROLINA, STATE OF OHIO, STATE OF OREGON, STATE OF PENNSYLVANIA, STATE OF TENNESSEE, STATE OF UTAH, STATE OF WYOMING,

Amici Curiae.

ORDER
Entered June 30, 1993

Before McKAY, Chief Judge, and HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges and O'CONNOR*, Senior District Judge.

*Honorable Earl E. O'Connor, Senior Judge, United States District Court for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied

Entered for the Court

ROBERT L. HOECKER, Clerk

UNITED STATES COURT OF APPEALS
Tenth Circuit
Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294
(303) 844-3157

Robert L. Hoecker
Clerk

Patrick Fisher
Chief Deputy



June 30, 1993

RECIPIENTS OF THE CAPTIONED OPINION

91-1360, USA v. State of Colorado
Filed April 6, 1993 by Judge Baldock

Please be advised that corrections have been made to pages 21, 22, 37 and 38 of the captioned opinion. Attached is a corrected copy.

Very truly yours,

ROBERT L. HOECKER, Clerk

By: Barbara Schermerhorn

Barbara Schermerhorn
Deputy Clerk

Attachment

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

STATE OF COLORADO and COLORADO DEPARTMENT OF HEALTH,

Defendants-Appellants.

No. 91-1360

STATE OF ALASKA, STATE OF ARKANSAS, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF INDIANA, STATE OF IOWA, STATE OF KANSAS, COMMONWEALTH OF KENTUCKY, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF MISSOURI, STATE OF NEBRASKA, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF NEW YORK, STATE OF NORTH CAROLINA, STATE OF OHIO, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF TENNESSEE, STATE OF UTAH, and STATE OF WYOMING,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 89-C-1646)

Gale A. Norton, Attorney General, State of Colorado (Raymond T. Slaughter, Chief Deputy Attorney General, State of Colorado, Timothy M. Tymkovich, Solicitor General, State of Colorado, Patricia S. Bangert, Deputy Attorney General, State of Colorado, Lynn B. Obernyer, First Assistant Attorney General, Natural Resources Section, State of Colorado, Casey A. Shpall, First Assistant Attorney General, State of Colorado, Laura E. Perrault, Assistant Attorney General, CERCLA Litigation Unit, State of

initiated. Id. at 10,523. In the EPA's view, § 9622(e)(6)'s authorization requirement applies, not only to a potentially responsible party's independent remedial action, but also to any action by a party which has been ordered by the state under its RCRA authority "as both types of action could be said to present a potential conflict with a CERCLA authorized action." Id. Thus, in the case of a conflict between the EPA and the state, § 9622(e)(6) authorizes the EPA to withhold authorization to a potentially responsible party from going forward with a RCRA corrective action ordered by the state. Id. Not surprisingly, the United States argues for deference to the EPA's interpretation of § 9622(e)(6). See Hill v. National Transp. Safety Bd., 886 F.2d 1275, 1278 (10th Cir. 1989).

The EPA's interpretation of § 9622(e)(6) has several problems, not the least of which is that it permits the EPA to preempt state law contrary to § 9614(a) and to modify a responsible party's obligations and liabilities under state RCRA programs contrary to § 9652(d). Section § 9622(e)(6) makes absolutely no mention of RCRA-authorized state actions, and it seems highly suspect that Congress intended this provision which is buried within a subsection entitled "notice provisions" in a section addressing settlements with private responsible parties to resolve conflicts between state-RCRA laws and CERCLA response actions. See H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 100 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2882 (§ 9622 was

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Mo eove applying the EPA interpreta i of 62 ederal li ies on rary the plain languag of CERLCA spec ical y addressing federal a ili ies U S Wes Supp 1 Congress expres y provided within he ederal ili i ec ion tha [ ]othing in this sec on shal af ec or impai he obliga ion of any departmen ag cy ins rumentali y the Uni ed Sta es o comply with any requiremen [RCRA] including correc ve action requirements Id § Whil he PA take the posi on tha its in erpreta ion of 62 e ) is not inconsistent with 62 beca RCRA requiremen can be achieved through the ARAR process pursuant to 62 d .) 54 Fed Reg a 526 the ARAR proce cannot be he exc us ve means o a RCRA thorized tat involvemen in the cleanup of a RCRA regulated s te becaus otherwise party obliga ions under other ederal and ta hazardous te laws would be modi ied during the closure period con rary to d) and ta law would be preempted rary .4 See supra By the same reasoning if the ARAR process cons i u ed sta e sole means of enforcing its RCRA program a a ederal facility the ederal agency s RCRA obliga ions prior to comple ion of the CERCLA remedial act on would be ed impai ed contrary the plain language of § 9 2 See R Rep No a reprinted in 1 U S C C A N 77 ( ederal il ties sec ion provides the

publ es and he EPA] crea ed th ty and grea i: assur ng the prob ems ha rdous substance re eases re deal with by expedi ious and approp a response ons ) nally iggered by he ini ia ion RI/FS The ederal ili provi requires ederal genci ommen RI/FS withi: ix months the ility i i: luded the ional pri i y lis U )( Wes Supp and ommence emedial ion within i een mon hs the udy compl ti id. ( ) whil the ame ime providing tha hi does no af ct impai the ag cy RCRA orrec ive ction requirement Id 62 (i Certainly Congre ould no have intended to require R /FS and RCRA compl ce in one sec i whil the same time barring RCRA omp iance when a RI/FS is ini iated in anothe ct on As summed up by one commen placemen the na onal p iority lis ] comp e i of RI FS and ini ia ion of remedial ion pursuant 9 does not impair RCRA obliga ions mere ini ia i the required inves gation cannot have thi ef ect J eph M Wi lging Why the EPA's Current Policies on Potential CERCLA-RCRA Authority Conflicts May be Wrong Fed iliti L J Spring 19

Becaus the EPA in erpr tation of ( is con rary the plain and sensibl reaning of 1 a) and 96 ( and when applied federal i we do ord i any def ence Hill F d a 127 quota ions omi ed In our view ( does not bar a te rom

exercising its EPA-delegated RCRA authority at a federal facility where a RI/FS has been initiated.

VIII.

We REVERSE the district court's grant of summary judgement for Plaintiff-Appellee, the United States. We REMAND to the district court with instructions to VACATE the order prohibiting Defendants-Appellants, Colorado and CDH, from taking any action to enforce the final amended compliance order and for further proceedings consistent with this opinion.

result of the NPL listing, Colorado should be enjoined from enforcing its RCRA compliance order for Basin F. Colorado then appealed to the Tenth Circuit.

COURT OF APPEALS RULING: A three judge panel of the U.S. Court of Appeals for the Tenth Circuit reversed. The Court held, among other things, that the State's enforcement of its RCRA compliance order was not a "challenge" to the CERCLA remedy barred by section 113 of CERCLA, that the State's participation in the CERCLA process should not be limited to involvement through ARARs only, that section 120(a)(4) of CERCLA should not be construed to mean that State laws are not independently enforceable at NPL sites, and that CERCLA section 122(e)(6) should not be interpreted to give EPA final authority over remedy decisions at CERCLA sites when the remedial objectives of EPA and a RCRA-authorized State are in conflict.

On May 21, 1993, the United States filed a petition for rehearing with suggestion for rehearing en banc in the Tenth Circuit. The United States raised three issues in its petition; (1) whether CERCLA section 121(e)(1), which states that no permits are required at CERCLA sites, precluded the State from imposing RCRA permit requirements at the Arsenal; (2) whether CERCLA Sections 121 and 122, which allow the EPA to select the CERCLA remedy and mandate State involvement through ARARs, preclude independent enforcement of the State's compliance order; and (3) whether section 113(h) of CERCLA, which bars challenges to CERCLA remedial actions, precludes Colorado from enforcing its compliance order.

The denial of the United States' petition for rehearing sends the case back to the United States District Court for the District of Colorado, in front of Judge Carrigan, for further proceedings consistent with the Tenth Circuit opinion. The United States must now decide whether it would be appropriate to petition the U.S. Supreme Court for Writ of Certiorari. The deadline for filing a petition is September 28, 1993. I have attached a memorandum from the Department of Justice that outlines the current status of the case.

RECOMMENDATION: Based on the following legal and practical considerations, I recommend that EPA support the filing of a petition for Writ of Certiorari. This recommendation does not represent a fully coordinated Region VIII position, but represents my best judgment for the most productive immediate course of action.

**A. Independent Enforcement of State Law at CERCLA Sites.**

1. Finding that Contradictory State Action is not a "Challenge." In the first part of an opinion that essentially eviscerates the ARAR concept, the Court finds that the State's

action to enforce its RCRA compliance order is not a challenge barred by CERCLA section 113(h). The Court succeeded in making this determination without an analysis of any facts and without considering whether the State's compliance order actually required any actions in conflict with the CERCLA action already underway. As noted below, the State of Colorado interprets this to mean that State enforcement of a RCRA compliance order can never be construed as a Section 113(h) challenge. The Tenth Circuit opinion is certainly susceptible to this interpretation.

2. Contradiction of Section 121(e)(1). Despite the clear and specific language of CERCLA Section 121(e)(1), which states that "no Federal, State, or local permit shall be required" for on-site remedial action, the Tenth Circuit has held that the Army must "update" its permit application for Basin F "to include all units currently containing Basin F hazardous waste." This would include the Basin F waste pile, the tanks now holding the basin F liquid, and the newly constructed and operating submerged quench incinerator (SQI) that is being used destroy the hazardous constituents of the Basin F liquids. As the Department of Justice has pointed out, this holding is erroneous because the State's compliance order was directed to Basin F, which at one time had RCRA interim status. The storage tanks, waste pile and SQI were only constructed as part of a CERCLA remedy, therefore, those units never had interim status and where not subject to any previous "permit." The Court's assertion that a mere permit "update" is required is disingenuous.

3. Destruction of the ARARs process. Relying on CERCLA Section 114(a) and 302(d), the Court of Appeals held that Congress could not have intended the ARARs process to be the exclusive means of State involvement in a CERCLA clean up "when the ARAR's concept did not even come into being until six years after CERCLA was enacted." The Court was not on strong ground in making this pronouncement since sections 114(a) and 302(d) are general savings clauses and 121(d) creates a clear and specific statutory scheme. In fact, the Justice Department has argued that this reasoning flies in the face of established principles of statutory construction.

Arguably, these three aspects of the Tenth Circuit's decision allow a State to enforce, independently, any State law at a Superfund site. In fact, in a recent law journal article, attorneys for the Colorado Attorney General's office have opined that as a result of the Court's ruling "states may independently enforce all of their own environmental laws at all CERCLA sites, even if a site is included on the NPL, and even if state requirements constitute a 'challenge' to the ongoing CERCLA action." Recently the Justice Department has suggested that the Court's ruling could be interpreted to allow the State to pursue criminal action against individual EPA or Army employees pursuant

to section 3008(d) of RCRA, if they direct actions in contravention of the State's compliance order. Although criminal action may be speculative, it is likely that the Tenth Circuit's opinion will give rise to litigation in this Region whenever the State and EPA disagree on clean up standards, without regard to the ARARs process or the stage of the CERCLA clean up involved.

**B. Rejection of EPA's Interpretation of Section 122(e)(6).** Section 122(e)(6) precludes responsible parties from taking actions inconsistent with a CERCLA remedial action. EPA's listing policy clearly states that section 122(e)(6) is applicable to the role of federal agencies as PRPs at federal facilities. In part because the section falls under the heading of "settlement," the Court rejected the notion that 122(e)(6) could be used to prevent a State from enforcing an order inconsistent with a CERCLA remedy. Nevertheless, no exception exists in the statute for inconsistent actions taken by a PRP based on a State order. In addition, 122(e)(6) is an important aspect of settlement, and EPA may find it difficult in the future to settle with PRPs if it cannot ensure that the state will not impose additional, inconsistent requirements on the settling PRP.

**C. Settlement.** The case has now been remanded to Judge Carrigan. Although the United States' motion to dismiss on preemption grounds has been denied, the United States still has a claim pending that asserts that the State's compliance order was arbitrary and capricious. In opposition, Colorado has a pending motion for partial summary judgment. If the United States loses this challenge, Judge Carrigan must decide the scope of injunctive relief available to the State. If the Court doesn't rule on the State's motion, we may face a full trial. In short, the Justice Department anticipates prolonged litigation. EPA, the Army and Shell have tried unsuccessfully in the past to settle with the State. It may be in the best interests of the United States to try again to settle this matter to avoid litigation and the uncertainty that surrounds day-to-day operations at the Arsenal. If we attempt to settle, the possibility that a Writ of Certiorari might be granted could strengthen the United States' bargaining position. Since it is difficult to demonstrate a clear conflict among Circuits, it is not likely that Certiorari would be granted. Nevertheless, the mere existence of the petition might weigh in our favor.

I continue to believe that the best resolution of the RCRA/CERCLA integration issue would come from a statutory change through reauthorization. Nevertheless, if the ruling from the Tenth Circuit stands, this Region must expect to become embroiled in litigation that will only serve to undermine EPA/State relations. We cannot rely on the ARAR process, we may not be able to offer PRPs (federal or private) protection from inconsistent State demands and subsequent civil penalties, and we cannot recommend that our employees risk criminal action by

failing to comply with an order from a RCRA-authorized State. For the foregoing reasons I urge you to recommend that EPA support the filing of a petition for Writ of Certiorari to the U.S. Supreme Court. If the United States ultimately decides not to file a petition, it is of critical importance that the Agency determine how to address the issues we have discerned from the Tenth Circuit's opinion. The broad scope of the Court's opinion could wreak havoc on the Superfund program in this region and nationally if EPA is caught unprepared during the long period before reauthorization, or while waiting for a case with more favorable facts to arise.

Attachment

cc: Jack McGraw, 8A (w/attachment)
Robert Duprey, 8HWM (w/attachment)

Colorado, with her on the briefs) Denver, Colorado, for Defendants-Appellants.

John T. Stahr, Attorney, Department of Justice, Environment and Natural Resources Division (Roger Clegg, Acting Assistant Attorney General, David C. Shilton, Bradley S. Bridgewater, Attorneys, Department of Justice, Environment and Natural Resources Division, with him on the brief) Washington, D.C., for Plaintiff-Appellee.

Lee Fisher, Attorney General, State of Ohio, and Jack A. Van Kley, Assistant Attorney General, Environmental Enforcement Section, State of Ohio, Columbus, Ohio, filed a brief on behalf of Amici Curiae. Charles E. Cole, Attorney General, State of Alaska, Juneau, Alaska; Winston Bryant, Attorney General, State of Arkansas, Little Rock, Arkansas; Daniel E. Lungren, Attorney General, State of California, Theodora Berger, Roderick E. Walston, Walter E. Wunderlich, Sara J. Russell, and Richard Tom, Los Angeles, California; Richard Blumenthal, Attorney General, State of Connecticut, Hartford, Connecticut; Linley E. Pearson, Attorney General, State of Indiana, Indianapolis, Indiana; Bonnie J. Campbell, Attorney General, State of Iowa, Des Moines, Iowa; Robert T. Stephan, Attorney General, State of Kansas, Topeka, Kansas; Randall G. McDowell, Manager, Natural Resources and Environmental Protection Cabinet, Commonwealth of Kentucky, Frankfort, Kentucky; Frank J. Kelley, Attorney General, State of Michigan, Lansing, Michigan; Hubert H. Humphrey, III, Attorney General, State of Minnesota, and Stephan Shakman, St. Paul, Minnesota; William L. Webster, Attorney General, State of Missouri, and Shelley A. Woods, Jefferson City, Missouri; Don Stenberg, Attorney General, State of Nebraska, Lincoln, Nebraska; Frankie Sue Del Papa, Attorney General, State of Nevada, Carson City, Nevada; Tom Udall, Attorney General, State of New Mexico, Santa Fe, New Mexico; Robert Abrams, Attorney General, State of New York, and Nancy Stearns, New York State Department of Law, Environmental Protection Bureau, New York, New York; Lacy H. Thornburg, Attorney General, State of North Carolina, Raleigh, North Carolina; Charles S. Crookham, Attorney General, State of Oregon, Salem, Oregon; Ernest D. Preate, Jr., Attorney General, Commonwealth of Pennsylvania, and Donald A. Brown, Director, Office of Chief Counsel, Bureau of Hazardous Sites & Superfund Enforcement, Harrisburg, Pennsylvania; Charles W. Burson, Attorney General, State of Tennessee, Nashville, Tennessee; Paul Van Dam, Attorney General, State of Utah, and Jan Graham, Solicitor General, Salt Lake City, Utah; and Joseph B. Meyer, Attorney General, State of Wyoming, Cheyenne, Wyoming, appeared on behalf of Amici Curiae.

Before BALDOCK and HOLLOWAY, Circuit Judges, and O'CONNOR, District Judge.*

BALDOCK, Circuit Judge.

This case examines the relationship between the Resource Conservation and Recovery Act of 1976 ("RCRA"), Pub. L. 94-580, 90 Stat. 2795, as amended by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6901-6981 (West 1983 & Supp. 1992) , and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Pub. L. No. 96-510, 94 Stat. 2767, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-9675 (West 1983 & Supp. 1992) and 26 U.S.C. § 9507 (West Supp. 1992) At issue is whether a state which has been authorized by the Environmental Protection Agency ("EPA") to "carry out" the state's hazardous waste program "in lieu of" RCRA, see 42 U.S.C. § 6926(b) (West Supp. 1992), is precluded from doing so at a hazardous waste treatment, storage and disposal facility owned and operated by the federal government which the EPA has placed on the national priority list, see id. § 9605(a)(8)(B), and where a CERCLA response action is underway. See 42 U.S.C. § 9604 (West 1983 & Supp. 1992).

* The Honorable Earl E. O'Connor, Senior Judge, United States District Court for the District of Kansas, sitting by designation.

I

The Rocky Mountai Arsenal Arsenal ) is a hazardous waste tmen orage and disposal facility subject to RCRA :egu on see U S C § 6924 (We t Supp 1992 which is l ca ed near Comme ce City Colorado in the Denver me ropolitan area The Uni ed Sta es government has owned the Arsenal since :2 and he Army opera ed from tha time until the mid 1980 Withou rei era ing its environmental hi tory suf i say tha the Arsenal is one of the worst hazardous poll i ite in the ountry Daigle v. Shell Oil Co. 9 F 2d 2 3 (10th Cir 1992 footnote omit ed) The present li iga focuses on Basin F which is a 92 acre basin oca ed wi hin the Arsenal where millions f gallons of liquid hazardous waste have been disposed of over the years

A.

Congress enacted RCRA in 9 6 to as ist the ities count es and ta es i the sol ion of the discarded materials problem and to provide nationwide protection against the dangers of improper hazardous wast disposal H R Rep No 1491 94th Cong 2d S ss 11 (1 6 reprinted in 1976 U S C C A N 6238 6249 RCRA requires the EPA to establish performance standards applicable to owners and opera ors of hazardous waste treatmen storage and disposal f ilities as may be necessary o protect human health

and the environment."[1] 42 U.S.C. § 6924(a) (West Supp. 1992). The EPA enforces RCRA standards by requiring owners and operators of facilities to obtain permits,[2] see 42 U.S.C. § 6925 (West 1983 & Supp. 1992), and by issuing administrative compliance orders and seeking civil and criminal penalties for violations. Id. § 6928. The EPA may authorize states to "carry out" their own hazardous waste programs "in lieu of" RCRA and to "issue and enforce permits for the storage, treatment, or disposal of hazardous waste" so long as the state program meets the minimum federal standards.[3] 42 U.S.C. § 6926(b) (West Supp. 1992). See also H.R. Rep. No. 1491(I) at 32, reprinted in 1976 U.S.C.C.A.N. at 6270 (under RCRA, states retain "primary authority" to implement hazardous waste programs). However, RCRA does not preclude a state from adopting more stringent requirements for the treatment, storage and disposal of hazardous waste. 42 U.S.C. § 6929 (West Supp. 1992). See also Old Bridge Chems., Inc. v. New Jersey Dep't of Envtl. Protection, 965 F.2d 1287, 1296 (3d Cir.) ("RCRA sets a floor not

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1 Among the standards promulgated by the EPA are specific requirements governing the closure of hazardous waste treatment, storage and disposal facilities. See 40 C.F.R. § 264.228 (1992) (closure and post-closure care); id. § 265.228 (closure and post-closure care for interim status facilities). See also 1 Donald W. Stever, Law of Chemical Regulation and Hazardous Wastes, § 5.06[2][d][iii][A], at 5-65 (1991).

2 Pending permit approval, RCRA permitted preexisting hazardous waste treatment, storage and disposal facilities to continue operating during the permit application process under "interim status." 42 U.S.C. § 6925(e)(1) (West Supp. 1992).

3 Congress encouraged states to develop their own hazardous waste programs by directing the EPA to "promulgate guidelines to assist States in the development of [such] programs." 42 U.S.C. § 6926(a) (West 1983).

a ceiling for state regulation of hazardous wastes"), cert. denied, 113 S. Ct. 602 (1992). Once the EPA authorizes a state to carry out the state hazardous waste program in lieu of RCRA, "[a]ny action taken by [the] State [has] the same force and effect as action taken by the [EPA] " 42 U.S.C. § 6926(d) 1983). The federal government must comply with RCRA or an EPA-authorized state program "to the same extent as any person . . . ."[4] 42 U.S.C. § 6961 (West 1983). In short, provides "a prospective cradle-to-grave regulatory regime governing the movement of hazardous waste in our society."[5] Rep. No. 1016(I), 96th Cong., 2d Sess. 17 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120. See also Old Bridge, 965 F.2d at 1292 (RCRA is "principal federal statute regulating the generation, transportation, and disposal of hazardous wastes").

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[4] In United States Dep't of Energy v. Ohio, 112 S. Ct. 1627 (1992), the Supreme Court held that federal agencies retained sovereign immunity from state civil penalties imposed under RCRA. Id. at 1639-40. See also Mitzelfelt v. Department of Air Force, 903 F.2d 1293, 1296 (10th Cir. 1990). However, Congress recently amended § 6961 to clearly provide that federal agencies are not immune from such penalties. See Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102, 106 Stat. 1505.

[5] In 1984, Congress amended RCRA with the enactment of HSWA which sought to close "various loopholes" that were allowing millions of tons of hazardous waste to escape RCRA's control. See H.R. Rep. No. 198(I), 98th Cong., 2d Sess. 19, reprinted in 1984 U.S.C.C.A.N. 5576, 5578. Congress was concerned that RCRA was not being "conducted in a manner that controls and prevents present and potential endangerment to public health and the environment" and enacted HSWA to prevent "future burdens on the 'Superfund' program . . . ." Id. at 20, reprinted in 1984 U.S.C.C.A.N. at 5579.

B

Because RCRA only applied prospectively, it was "clearly inadequate" to deal with "'the inactive hazardous waste site problem.'" H.R. Rep. No. 1016(I), at 17-18, reprinted in 1980 U.S.C.C.A.N. at 6120. Consequently, Congress enacted CERCLA in 1980 "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." Id. at 22, reprinted in 1980 U.S.C.C.A.N. at 6125. Among its provisions, CERCLA required the President to revise the "national contingency plan for the removal of . . hazardous substances" which would "establish procedures and standards for responding to releases of hazardous substances . " 42 U.S.C. § 9605(a) (West Supp. 1992). See also 40 C.F.R. pt. 300 (1992). When "any hazardous substance is released or there is a substantial threat of such a release into the environment," CERCLA authorizes the President to

> act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance . . . at any time . . . or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

42 U.S.C. § 9604(a)(1) (West Supp. 1992). CERCLA finances these government response actions through the Hazardous Substance Superfund, see id. § 9611(a)(1); 26 U.S.C. § 9507 (West Supp. 1992), and permits the government to seek reimbursement from responsible parties by holding them strictly liable. Id.

§ 9607(a). See also H.R. Rep. No. 1016, at 17, 1980 U.S.C.C.A.N at 6120 (CERCLA establishes "a Federal cause of action in strict liability to enable [the EPA] to pursue rapid recovery of the costs . . . of [response] actions"). See, e.g., United States v. Hardage, 982 F.2d 1436, 1443 (10th Cir. 1992). CERCLA also requires the President to develop a national priority list, as part of the national contingency plan, which identifies "priorities among releases or threatened releases throughout the United States" for government response actions, id. § 9605(a)(8). See 40 C.F.R. pt. 300 app. B (1992), and the listing of a particular site on the national priority list is a prerequisite to a Superfund-financed remedial action at the site. 40 C.F.R. § 300.425(b)(1) (1992). We note that Superfund monies cannot be used for remedial actions at federal facilities, 42 U.S.C § 9611(e)(3) (West Supp. 1992), but CERCLA otherwise applies to the federal government "to the same extent, both procedurally and substantively, as any nongovernmental entity." Id. § 9620(a)(1). In short, CERCLA is a remedial statute "designed to facilitate cleanup of environmental contamination caused by releases of hazardous substances."[6] Colorado v. Idarado Mining Co., 916 F.2d

[6] Congress amended CERCLA in 1986 by enacting SARA after realizing that CERCLA was "inadequate" to address the environmental threat presented by abandoned hazardous waste sites See H.R. Rep. No. 253, 99th Cong., 2d Sess. 54-55 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2836-37. SARA "buil[t] on existing law and significantly strengthen[ed] [CERCLA] in all respects . . . [as well as] provid[ing] the EPA with appropriate flexibility and discretion in order to respond appropriately to each site . . . ." Id. at 56, reprinted in 1986 U.S.C.C.A.N. at 2838.

1486, 1488, 1492 (10th Cir. 1990), cert. denied, 111 S. Ct. 1584 (1991). See also Daigle, 972 F.2d at 1533.

II.

In November 1980, the Army, as the operator of the Arsenal, submitted to the EPA part A of its RCRA permit application[7] which listed Basin F as a hazardous waste surface impoundment.[8] Appellants' App. at 413. By submitting the part A RCRA application, the Army achieved RCRA interim status. See supra note 2. In May 1983, the Army submitted part B of its RCRA permit application to the EPA which included a required closure plan for Basin F, Appellants' App. at 505, and the following month, the Army submitted a revised closure plan for Basin F. Appellants' App. at 471. See also supra notes 1 and 7. In May 1984, the EPA issued a notice of deficiency to the Army regarding part B of its RCRA permit application and requested a revised part B application

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[7] Obtaining a RCRA permit is a two-step process. Part A of the permit application requires general information concerning the facility, the operator, the hazardous wastes and the processes for treatment, storage and disposal. See 40 C.F.R. § 270.13 (1992). Part B of the permit application requires more detailed information including a specific closure plan. See id. § 270.14.

[8] As a hazardous waste surface impoundment, Basin F is subject to specific RCRA regulations. See 40 C.F.R. §§ 265.220-265.230 (1992) (interim status standards for surface impoundments). Further, under HSWA, an interim status surface impoundment cannot receive, store, or treat hazardous waste after November 8, 1988, unless (1) it is in compliance with § 6924(o)(1)(A) which requires the "installation of two or more liners," a "leachate collection system," and "groundwater monitoring," or (2) it has at least one liner and there is no evidence that it is leaking, is located more that a quarter mile from an underground source of drinking water, and is in compliance with the groundwater requirements applicable to RCRA permitted facilities. See 42 U.S.C. § 6925(j) (West Supp. 1992). See also id. § 6924(o)(1).

within sixty days under threat of termination of the Army's interim status. Appellants' Br. Attach. 12. The Army never submitted a revised part B RCRA permit application to the EPA; rather, in October 1984, the Army commenced a CERCLA remedial investigation/feasibility study ("RI/FS").[9] Appellee's App. at 9, 30.

Effective November 2, 1984, the EPA, acting pursuant to 42 U.S.C. § 6926(b) (West Supp. 1992), authorized Colorado to "carry out" the Colorado Hazardous Waste Management Act ("CHWMA" , Colo Rev. Stat. §§ 25-15-301 to 25-15-316 (1989 & Supp. 1992), "in lieu of" RCRA. See 49 Fed. Reg. 41,036 (1984). That same month, the Army submitted its part B RCRA/CHWMA permit application to the Colorado Department of Health ("CDH") which is charged with the administration and enforcement of CHWMA. Appellants' App. at 473. Notably, the part B application was the same deficient application that the Army submitted to the EPA in June 1983. Id Not

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[9] While most of the President's CERCLA authority has been delegated to the EPA pursuant to 42 U.S.C. § 9615 (West 1983), the President delegated his CERCLA response action authority under § 9604(a-b) with respect to Department of Defense facilities to the Secretary of Defense. See Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981), as amended by Exec. Order No. 12,418, 48 Fed. Reg. 20,891 (1983), revoked by and current delegation of authority at Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (1987). A RI/FS is the first step in a CERCLA remedial action in order "to assess site conditions and evaluate alternatives to the extent necessary to select a remedy." 40 C.F.R. § 300.430(a)(2) (1992). Interestingly, the Army initiated the RI/FS during the month preceding HSWA's effective date, which provided that RCRA interim status surface impoundments undertake corrective action in order to continue treating, storing and disposing of hazardous waste after November 1988. See supra note 8. The Army has since maintained that its CERCLA response action precludes Colorado from enforcing its EPA-delegated RCRA authority at the Arsenal.

surprisingly, CDH found the application, specifically the closure plan for Basin F, to be unsatisfactory. Id.

Consequently, in May 1986, CDH issued its own draft partial closure plan for Basin F to the Army, id. at 481, and in October 1986, CDH issued a final RCRA/CHWMA modified closure plan for Basin F and requested the Army's cooperation in immediately implementing the plan. Id. at 393. The Army responded by questioning CDH's jurisdiction over the Basin F cleanup. Id. at 395-96.

In response to the Army's indication that it would not implement CDH's closure plan for Basin F, Colorado filed suit in state court in November 1986. Colorado sought injunctive relief to halt the Army's alleged present and future violations of CHWMA and to enforce CDH's closure plan for Basin F. The Army removed the action to federal district court, and moved to dismiss Colorado's CHWMA enforcement action claiming that "CERCLA's enforcement and response provisions pre-empt and preclude a state RCRA enforcement action with respect to the cleanup of hazardous wastes at the Arsenal." Colorado v. United States Dept. of the Army, 707 F. Supp. 1562, 1565 (D. Colo. 1989).

In June 1986, the Army announced that it was taking a CERCLA interim response action with respect to Basin F. Appellee's App. at 20. In September 1986, the Army agreed with Shell Chemical Company[10] on an interim response action in which Shell would

[10] From 1946 to 1982, Shell leased a portion of the Arsenal from the Army and disposed of hazardous wastes in Basin F.

cons ru orage tanks with total capacity our mil ion g lons hold Ba in iquids Id In June he Army the E A Shel and Colorado agreed on Basin F interim response ion whi required the Armv remove contaminated liquids the emporary orage tanks and contaminated ludges and soi to emporary ho ing area un il de erminati inal Arsenal wide remedy Id a 7 In Augus 19 7 the Army eque ed ha Co orad en i y poten ial app icable relevan and appropria requirements ARAR see 42 U C d W Supp infra no th Basin n im respons a tion and in October 19 the Army requested comment on its plan see U S C 1 E) (We Supp 19 ) however Col rado did not respond o either of these requests Appellee App 1

In October 19 the Army advised Colorado tha t was withdrawing its till pending part RCRA/CHWMA permi appl cation laiming tha was ceasing operations of all structures addres ed in he applica ion and tha i intended remediate Basin F pursuant to CERCLA Appellants App at The Army indi ed tha i would however comply with RCRA and CHWMA in accordance with CERCLA' provisions at 42 U C 620(i and § d A i) Id a

In December 1 .7 the Army transmi ted draf decis documen or the Basin in erim response action to the EPA, Shell and Colorado and ini ia ed a thirty day publi comment period see 4 U 1 Wes Supp Appel ee App a In

January 1988, the Army issued its decision document for the Basin F interim response action. Appellants' App. at 5. Thereafter, the Army began the Basin F interim response action, and, in December 1988, completed the removal of eight million gallons of hazardous liquid wastes from Basin F, relocating four million gallons to three lined storage tanks and four million gallons to a double-lined holding pond. Appellee's App. at 12. In addition, the Army removed 500,000 cubic yards of contaminated solid material from Basin F, dried it, and placed it in a sixteen acre, double lined, capped wastepile. Id. The Army also capped the Basin F floor.[11] Id.

In February 1989, the federal district court denied the Army's motion to dismiss Colorado's CHWMA enforcement action. The district court relied on several provisions of both RCRA and CERCLA, including CERCLA's provision for the application of state laws concerning removal and remedial action at federal facilities

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[11] The Basin F interim response action led several nearby residents to sue for damages allegedly caused by the release of airborne pollutants. See Daigle v. Shell Oil Co., 977 F.2d 1527, 1532 (10th Cir. 1992). The Basin F interim response action also calls for the Army to incinerate the removed liquids. This has yet to be done. Final disposition of the solids remaining under the Basin F cap and in the wastepile will be determined as part of the remedial action for which a final record of decision will be issued in 1994.

not listed on the national priority list.[12] Colorado v. United States Dep't of the Army, 707 F. Supp. at 1569-70 (citing 42 U.S.C. § 9620(a)(4)). The district court found this provision to be particularly noteworthy in light of the fact that Basin F was not listed on the national priority list. Id. Furthermore, the district court expressed particular concern about the relationship between the Army and the EPA, noting that the EPA's "potential monitoring of the Army's Basin F cleanup operation under CERCLA does not serve as an appropriate or effective check on the Army's efforts,"[13] and that Colorado's involvement "would guarantee the salutary effect of a truly adversary proceeding that would be more likely, in the long run, to achieve a thorough cleanup." Id. at 1570. Thus, the district court held that Colorado was not

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[12] Additionally, the district court relied on RCRA's provision regarding its application to federal facilities, 707 F. Supp. at 1565 (citing 42 U.S.C. § 6961), and its citizen suit provision. Id. at 1565-66 (citing 42 U.S.C. § 6972). The district court also relied on CERCLA's provisions permitting a state to impose additional requirements on the release of hazardous waste and preserving all other obligations or liabilities of persons under other federal or state law, id. at 1569 (citing 42 U.S.C. §§ 9614(a), 9652(d)), and CERCLA's provisions concerning federal facilities which indicated to the district court that CERCLA did not affect or impair the obligation of a federal facility to comply with RCRA. Id. (citing 42 U.S.C. §§ 9620(a)(1), 9620(a)(4), 9620(i)).

[13] The district court noted that the Army, as a responsible party, has an "obvious financial interest to spend as little money and effort as possible on the cleanup," whereas the EPA has the responsibility "to achieve a clean up as quickly and thoroughly as possible . . . ." 707 F. Supp. at 1570. The district court also noted that the same Justice Department attorneys were representing both the Army and the EPA despite the court's expressed concern over a conflict. Id.

well-settled principles.[17] In addition to arguing that § 9613(h) bars Colorado from enforcing its EPA-delegated RCRA authority, the United States alternatively contends that CERCLA's provision, which grants the President authority to select the remedy and allow for state input through the ARAR's process, see 42 U.S.C. § 9621 (West Supp. 1992), bars Colorado from enforcing state law independent of CERCLA. See Hill v. Ibarra, 954 F.2d 1516, 1525 (10th Cir. 1992) ("grant of summary judgment . . may be upheld on any grounds supported by the record").

We review a district court order granting or denying summary judgment de novo, applying the same standard as the district court. United States v. Hardage, No. 92-6101, 1993 WL 35384 at *2 (10th Cir. Feb. 16, 1993). Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, we construe the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. Hardage, No. 92-6101, 1993 WL 35384 at *2.

As this is a case of statutory construction, our job is to effectuate the intent of Congress. Colorado v. Idarado Mining 916 F.2d 1486, 1494 (10th Cir. 1990), cert. denied, 111 S. 1584 (1991). While our starting point is the statutory

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[17] Colorado also argues that the district court's order violates the separation of powers doctrine by allowing an executive branch agency to dictate the outcome of pending litigation. In light of our holding, we need not address this argument.

precluded from enforcing CHWMA, pursuant to its EPA-delegated RCRA authority, despite the Army's cleanup efforts under CERCLA. Id.

In March 1989, the month following the district court's order, the EPA added Basin F to the national priority list.[14] 54 Fed. Reg. 10,512 (1989). The Army immediately moved for reconsideration of the district court's order in light of the EPA's listing of Basin F on the national priority list

In September 1989, CDH, acting in accordance with the district court's February 1989 order, issued a final amended compliance order to the Army, pursuant to CDH's authority under CHWMA. The final amended compliance order requires the Army to submit an amended Basin F closure plan, as well as plans and schedules addressing soil contamination, monitoring and mitigation, groundwater contamination, and other identified tasks for each unit containing Basin F hazardous waste as required under CHWMA. Appellants' App. at 96-103. The final amended compliance order also requires that CDH shall approve all plans and that the

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[14] Although the EPA had listed the Arsenal on the national priority list in July 1987, 52 Fed. Reg. 27,620, 27,641 (1987), Basin F was expressly excluded from the national priority list "because the EPA believed that Basin F might be subject to RCRA Subtitle C corrective action authorities and thus might be appropriate for deferral . . . ." 54 Fed. Reg. 10,512, 10,515 (1989). See also 48 Fed. Reg. 40,682 (1983) (describing EPA policy of deferring national priority listing of sites undergoing RCRA cleanup); 49 Fed. Reg. 40,323-40,324, 40,336 (1984). See generally Apache Powder Co. v. United States, 968 F.2d 66, 68 (D.C. Cir. 1992). When the EPA added Basin F to the national priority list in 1989, it indicated that Basin F should not have been deferred from listing under the policy in effect in 1987 because it had stopped receiving RCRA hazardous wastes prior to July 26, 1982 and did not certify closure prior to January 26, 1983. 54 Fed. Reg. at 10,515-10,516 & n.2.

Army shall not implement any closure plan or work plan prior to approval in accordance with CHWMA. Id. at 98.

As a result of the final amended compliance order, the United States filed the present declaratory action, invoking the district court's jurisdiction under 28 U.S.C. § 2201. The United States' complaint sought an order from the federal district court declaring that the final amended compliance order is "null and void" and enjoining Colorado and CDH from taking any action to enforce it.[15] Id. at 13. Colorado counterclaimed requesting an injunction to enforce the final amended compliance order.[16] Id. at 35-41. On cross motions for summary judgment, the district court relied on CERCLA's provision which limits federal court jurisdiction to review challenges to CERCLA response actions, see 42 U.S.C. § 9613(h) (West Supp. 1992), and held that "[a]ny attempt by Colorado to enforce [] CHWMA would require [the] court to review the [Army's CERCLA] remedial action . . . prior to [its] completion" and that "[s]uch a review is expressly prohibited by

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[15] The United States filed the present action while the Army's motion for reconsideration of the district court's February 1989 order in Colorado's enforcement action was still pending. Following the district court's ruling in the present case, the district court dismissed Colorado's earlier enforcement action which was the subject of the district court's February 1989 order.

[16] Colorado also counterclaimed for civil penalties. The district court dismissed this counterclaim on sovereign immunity grounds, relying on this court's opinion in Mitzelfelt v. Department of Air Force, 903 F.2d 1293 (10th Cir. 1990). See United States v. Colorado, No. 89-C-1646 (D. Colo. June 19, 1990) (order). Although Congress has subsequently amended RCRA to expressly allow for civil penalties to be enforced against federal facilities, see supra note 4, Colorado has not appealed the dismissal of its counterclaim for civil penalties.

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language, Hallstrom v. Tillamook County, 493 U.S. 20, 25, 28-29 (1989), we must also look to the design of the statute as a whole and to its object and policy. Crandon v. United States, 494 U.S. 152, 158 (1990). See also King v. St. Vincent's Hosp., 112 S. Ct. 570, 574 (1991 (statute must be read as a whole because "meaning, plain or not, depends on context"). When Congress has enacted two statutes which appear to conflict, we must attempt to construe their provisions harmoniously. Negonsott v. Samuels, 933 F.2d 818, 819 (10th Cir. 1991), aff'd, No. 91-5397, 1993 WL 44242 (U.S Feb. 24, 1993). See also County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 112 S. Ct. 683, 692 (1992) ("Courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is [our] duty . absent clearly expressed congressional intention to the contrary, to regard each as effective."). Even when a later enacted statute is not entirely harmonious with an earlier one, we are reluctant to find repeal by implication unless the text or legislative history of the later statute shows that Congress intended to repeal the earlier statute and simply failed to do so expressly. United States v. Barrett, 837 F.2d 933, 934 (10th Cir. 1988). See also Kremer v. Chemical Constr. Corp., 456 U.S. 461, 470 (1982) "an implied repeal must ordinarily be evident from the language or operation of the statute"). We turn now to the application of these well-settled rules of statutory construction to this particular case.

## IV

Th i ourt ocused CERCLA provisi governing i il proceeding which ran ede al ourt exclusive jurisdi ion ove 11 ons ari ing unde CERCLA U § 3 b) Wes Supp As the dis i court recogni ed § 6 (h exp ly limi th ran urisdiction by providing wi h except ons elevan he tha [:] Federa court shall ha isdi ion unde Federal l revi any cha leng removal or emedial action el ed unde: i thi itl Id 1 h) However con rary the i ict ourt easoning h does not bar federal ourt rom reviewing a CERCLA response acti pri to ompl i rather i bars ederal ourts rom eviewing any chal enge CERCLA response actions Thi i a ri ical di in ion because an ction by Colorado enforc the inal amended compliance order i sued pursuant its EPA delegated RCRA hori y i not a challenge to the Army s CERCLA response ti To hold therwis woul require us to ignore the plain languag and ructure o both CERCLA and RCRA and o ind tha CERCLA imp i i ly repealed RCRA enforcement provisions contrary Congr expressed in ent: on

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shall affect or modify in any way the obligations or liabilities of any person[18] under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d) (West 1983). Similarly, CERCLA's provision entitled "relationship to other laws" provides that "[n]othing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a) (West 1983). By holding that § 9613(h) bars Colorado from enforcing CHWMA, the district court effectively modified the Army's obligations and liabilities under CHWMA contrary to § 9652(d), and preempted Colorado from imposing additional requirements with respect to the release of hazardous substances contrary to § 9614(a).

As a federal facility, the Arsenal is subject to regulation under RCRA. See 42 U.S.C. § 6961 (West 1983). More importantly, because the EPA has delegated RCRA authority to Colorado, the Arsenal is subject to regulation under CHWMA. Id. See also Parola v. Weinberger, 848 F.2d 956, 960 (9th Cir. 1988) (§ 6961 "unambiguously subjects federal instrumentalities to state and local regulation"). While the President has authority to exempt federal facilities from complying with RCRA or respective state laws "if he determines it to be in the paramount interest of the United States," 42 U.S.C. § 6961 (West 1983), nothing in this

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18 "Person" under CERCLA is defined to include the United States government. 42 U.S.C. § 9601(21) (West Supp. 1992).

record indicates that the Army has been granted such an exemption with respect to its activities at the Arsenal. Thus, Colorado has authority to enforce CHWMA at the Arsenal, and "[a]ny action taken by [Colorado] [has] the same force and effect as action taken by the [EPA] Id. 6926(d).

Notwithstanding Colorado's RCRA authority over the Basin F cleanup, and CERCLA's express preservation of this authority § 9613(h), which was enacted as part of SARA, limits federal court jurisdiction to review challenges to CERCLA response actions Congress' expressed purpose in enacting § 9613(h) was "to prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing the EPA's cleanup activities." H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 266 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2941 (emphasis added). Nonetheless, the language of § 9613(h) does not differentiate between challenges by private responsible parties and challenges by a state. Thus, to the extent a state seeks to challenge a CERCLA response action, the plain language of § 9613(h) would limit a federal court's jurisdiction to review such a challenge. See, e.g., Alabama v. EPA, 871 F.2d 1548, 1557 (11th Cir.), cert. denied, 493 U.S. 991 (1989)

Be that as it may, an action by a state to enforce its hazardous waste laws at a site undergoing a CERCLA response action is not necessarily a challenge to the CERCLA action. For example, CDH's final amended compliance order does not seek to halt the Army's Basin F interim response action; rather it merely seeks the

Army's compliance with CHWMA during the course of the action, which includes CDH approval of the Basin F closure plan prior to implementation. Thus, Colorado is not seeking to delay the cleanup, but merely seeking to ensure that the cleanup is in accordance with state laws which the EPA has authorized Colorado to enforce under RCRA. In light of §§ 9652(d) and 9614(a), which expressly preserve a state's authority to undertake such action we cannot say that Colorado's efforts to enforce its EPA-delegated RCRA authority is a challenge to the Army's undergoing CERCLA response action.

The United States relies principally on two cases to support its claim that § 9613(h) bars any action by Colorado to enforce the final amended compliance order. In Schalk v. Reilly, 900 F.2d 1091 (7th Cir. , cert. denied, 111 S. Ct. 509 (1990), the Seventh Circuit held that § 9613(h) barred private citizens from bringing a CERCLA citizen suit which challenged a consent decree between the EPA and a responsible party on the grounds that failure to prepare an environmental impact statement violated the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. 900 F.2d at 1095. Responding to the citizens' argument that they were not challenging the remedial action but rather merely asking that certain procedural requirements be met, the court held that "challenges to the procedure employed in selecting a remedy nevertheless impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of the

statute; the statute necessarily bars these challenges." Id. at 1097.

While we do not doubt that Colorado's enforcement of final amended compliance order will "impact the implementation" of the Army's CERCLA response action, we do not believe that this alone is enough to constitute a challenge to the action as contemplated under § 9613(h). The plaintiffs in Schalk were attempting to invoke the federal court's jurisdiction under CERCLA's citizen suit provision. See 42 U.S.C. § 9659 (West Supp 1992). While one of the exceptions to § 9613(h)'s jurisdictional bar is for CERCLA citizen suits, such suits "may not be brought with regard to a removal where a remedial action is to be undertaken at the site." Id. § 9613(h)(4). Thus, the CERCLA citizen suit in Schalk was jurisdictionally barred by the plain language of the statute. See 900 F.2d at 1095. Accord Alabama v. EPA, 871 F.2d at 1557. Unlike the plaintiffs in Schalk, Colorado has not asserted and need not assert jurisdiction under CERCLA's citizen suit provision to enforce the final amended compliance order; therefore, Schalk's reasoning does not apply.

Nonetheless, the plain language of § 9613(h) bars federal courts from exercising jurisdiction, not only under CERCLA, but under any federal law to review a challenge to a CERCLA remedial action. See 42 U.S.C. § 9613(h) (West Supp. 1992). In Boarhead Corp. v. Erickson, 923 F.2d 1011 (3d Cir. 1991), the Third Circuit held that § 9613(h) barred the federal court from exercising federal question jurisdiction, 28 U.S.C. § 1331, under the

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B.

Not only is the district court's construction of § 9613(h) inconsistent with §§ 9652(d) and 9614(a) of CERCLA, it is also inconsistent with RCRA's citizen suit provision. See 42 U.S.C § 6972 (West 1983 & Supp. 1992). While CERCLA citizen suits cannot be brought prior to the completion of a CERCLA remedial action, Schalk, 900 F.2d at 1095, RCRA citizen suits to enforce its provisions at a site in which a CERCLA response action is underway can be brought prior to the completion of the CERCLA response action.

RCRA's citizen suit provision permits any person to commence a civil action against any other person, including the United States government or its agencies, to enforce "any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to" RCRA. 42 U.S.C. § 6972(a)(1)(A) (West Supp. 1992). Such suits are prohibited if the EPA or the state has already "commenced and is diligently prosecuting" a RCRA enforcement action. Id. § 6972(b)(1)(B) See, e.g., Supporters to Oppose Pollution, Inc. v. Heritage Group, 973 F.2d 1320, 1323-24 (7th Cir. 1992). Federal courts have jurisdiction over such suits and are authorized "to enforce the permit, standard, regulation, condition, requirement, prohibition, or order " 42 U.S.C. § 6972(a) (West Supp. 1992).

RCRA's citizen suit provision also permits any person to commence a civil action against any other person, including the United States government or its agencies, to abate an "imminent

and substantial endangerment to health or the environment . "

§ 6972(a)(1)(B). These types of RCRA citizen suits are prohibited, not only when the EPA is prosecuting a similar RCRA imminent hazard action pursuant to 42 U.S.C. § 6973, but also when EPA is prosecuting a CERCLA abatement action pursuant to 42 U.S.C. § 9606; the EPA is engaged in a CERCLA removal action or has incurred costs to initiate a RI/FS and is "diligently proceeding" with a CERCLA remedial action pursuant to 42 U.S.C. § 9604; or the EPA has obtained a court order or issued an administrative order under CERCLA or RCRA pursuant to which a responsible party is conducting a removal action, RI/FS, or remedial action. Id. § 6972(b)(2)(B). Federal courts have jurisdiction over RCRA citizen imminent hazard suits and are authorized "to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment transportation, or disposal of any solid or hazardous waste . " Id. § 6972(a).

By prohibiting RCRA citizen imminent hazard suits with respect to hazardous waste sites where a CERCLA response action is underway, while not prohibiting RCRA citizen enforcement suits with respect to such sites, Congress clearly intended that a CERCLA response action would not prohibit a RCRA citizen enforcement suit. Because the definition of "person" under RCRA includes a state, 42 U.S.C. § 6903(15) (West 1983), Colorado could enforce RCRA in federal court by relying on RCRA's citizen enforcement suit provision, 42 U.S.C. § 6972(a)(1) (West Supp.

provi ed tha omp ied wi he requi i i provi ons See id b A See also Hallstrom v. Tillamook County U compl with ce rovi ion i a manda ry condi i precedent Be CHWMA became e pursuan he EPA de eg ion RCRA thori y Colorado and he inal amended omp ian rder was i sued pursuant CHWMA Col rado could arguably k enforceme the inal amended ompliano order edera court pursuan However need not de de thi issue Whil Colorado coun erclaim sough nf emen of th ina amended ompliance orde in the di trict our Colorado erted he oun er laim solely unde CHWMA l iming tha was compulsory pursuant o Fed R Civ and eeking invoke the dis ri court anci ary uriedicti See Appe lan App Thu do no expre any opinion on whether federal court urisdi ion ove Colorado coun erclaim proper und 72 A) Nonetheless our di cus of th provi i i re evan o our de ermina ion tha Congres did end CERCLA respons a ion to bar RCRA enforcemen i r an equivalen a ti by a which has been authorized by EPA o enf ce ta e hazardous was laws in lieu of RCRA

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consistent with its ongoing duty to protect the health and environment of its citizens. CERCLA itself recognizes that these requirements are applicable to a facility during the pendency CERCLA response action. See Moskal v. United States, 498 U.S. 103, 109-10 (1990) (statutes must be construed to give effect to "every clause and word"). Further, RCRA contemplates that enforcement actions may be maintained despite an ongoing CERCLA response action, and we cannot say that CERCLA implicitly repealed RCRA's enforcement provision given CERCLA's clear statement to contrary. See Manor Care, Inc. v. Yaskin, 950 F.2d 122, 127 (3d Cir. 1991 ("Congress did not intend for CERCLA remedies to preempt complementary state remedies."). While the decision to use CERCLA or RCRA to cleanup a site is normally a "policy question[] appropriate for agency resolution," Apache Powder Co. v. United States, 968 F.2d 66, 69 (D.C. Cir. 1992), the plain language of both statutes provides for state enforcement of its RCRA responsibilities despite an ongoing CERCLA response action. Thus, enforcement actions under state hazardous waste laws which have been authorized by the EPA to be enforced by the state in lieu of RCRA do not constitute "challenges" to CERCLA response actions; therefore, § 9613(h) does not jurisdictionally bar Colorado from enforcing the final amended compliance order.

V.

Even if an action by Colorado to enforce the final amended compliance order would be a "challenge" to the Army's CERCLA response action, the plain language of § 9613(h) would only bar a

federal court from exercising jurisdiction over Colorado's action Colorado, however, is not required to invoke federal court jurisdiction to enforce the final amended compliance order. Rather, Colorado can seek enforcement of the final amended compliance order in state court. Therefore, § 9613(h) cannot Colorado from taking "any" action to enforce the final compliance order

The final amended compliance order was issued by CDH pursuant to its authority under CHWMA. CHWMA not only authorizes CDH to issue compliance orders, it also authorizes CDH to request the state attorney general to bring suit for injunctive relief or civil or criminal penalties. Colo. Rev. Stat. § 25-15-308(2)(a) (Supp. 1992). See also id. § 25-15-309 (administrative and civil penalties); id. § 25-15-310 (criminal offenses-penalties). Compare 42 U.S.C. § 6928(a)(1 (West Supp. 1992) (authorizing EPA to issue RCRA compliance orders, assess civil penalties, and bring civil enforcement action); id. § 6928(d) (criminal penalties for knowing violations of RCRA). Unlike RCRA-enforcement suits by the EPA which must be brought in federal court, 42 U.S.C. § 6928(a)(1 (West Supp. 1992), CHWMA enforcement actions must be brought in the state "district court for the district in which the site or facility is . . located" or in the "district in which the violation occurs." Colo. Rev. Stat. §§ 25-15-305(2)(b), 25-15-309(1) (Supp. 1992). As the operator of a federal facility subject to regulation under CHWMA, the Army is subject to "process or sanction" of the Colorado state courts with respect to

enforcement of CHWMA. 42 U.S.C. § 6961 (West 1983). Because Colorado may bring an enforcement suit in state court, § 9613(h) does not preclude Colorado from taking "any" action to enforce the final amended compliance order.

VI.

By distinguishing its February 1989 order, which recognized that Colorado could enforce CHWMA with respect to Basin F, from its order in this case, which enjoined Colorado and CDH from taking any action to enforce the final amended compliance, based on the EPA's subsequent placement of Basin F on the national priority list, the district court also appears to have implicitly relied on 42 U.S.C. § 9620(a)(4) (West Supp. 1992). Section 9620 sets forth CERCLA's application to federal facilities. Subsection (a)(4) provides, in relevant part, that "[s]tate laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, instrumentality of the United States when such facilities are not included on the National Priority list." Id. Apparently, the district court construed this subsection as precluding the application or enforcement of state laws concerning removal or remedial action at federal facilities which are listed on the national priority list

As the United States candidly concedes, the district court's application of § 9620(a)(4) is incorrect. See Appellee's Br. at 36. At most, § 9620(a)(4) determines the controlling law, not

f dera rt i: i ove actions by a Mor ove the di i t ourt reasoning egards CHWMA as ta aw concerning removal an emedial a i Whi recogni tha CERCLA de ini i emoval and remedial i i on vab y broad enough ompas certai RCRA corrective ions see U C 4) Wes upp 1: believe tha had Congre ended a ) to exc ude rom enfor ng thei EPA de ega ed RCRA responsibi i ie i wou ha exp: y said The di ri court reasoning i: ry § i which exp: y preserves the ob iga ons federal agen i: omply with any requiremen of [RCRA] in luding correc ive i requirement ) U C i W Supp This provi ion indica es tha Congres did not i: tend tha RCRA aws thorized by the EPA be enfor ed in l of RCRA be equival ws con rning emoval and remedial a ions

Despi the Un ed ta oncess on concerning the incorrect appli ion 62 ( ) 4 argues tha the listing of Basin F on the na ional priority is removes any doubt tha Colorado s enf rcemen of CHWMA the Arsenal is precluded by § 96 h Howeve: he na ional priority ist is nothing more han the li of priori y releases for ong term emedial evalua i and respons 4 F R 4 (b) (19 ) rve: prima ily i: orma ional purposes iden ifying or the ta es and the pub i thos il i and i: or other rel

which appear to warrant remedial action."[19] S. Rep. No. 848, 96th Cong., 2d Sess. 60 (1980). Placement on the national priority list simply has no bearing on a federal facility's obligation to comply with state hazardous waste laws which have been authorized by an EPA delegation of RCRA authority or a state's ability to enforce such laws

VII.

The United States alternatively contends that CERCLA's provision, which grants the President authority to select the remedy and allow for state input through the ARAR's process, see 42 U.S.C. § 9621 (West Supp. 1992), bars Colorado from enforcing state law independent of CERCLA. This is a curious argument in light of §§ 9614(a) and 9652(d) which expressly preserve state RCRA authority, and we find it to be without merit.

A.

While the United States does not dispute that Congress intended states to play a role in hazardous waste cleanup, the United States argues that the states' role when a CERCLA response

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[19] The legal significance of a particular site being placed on the national priority list is that "[o]nly those releases included on the [national priority list] shall be considered eligible for Fund-financed remedial action." 40 C.F.R. § 300.425(b)(1) (1992). Given that federal facilities, like the Arsenal, are not eligible for Superfund-financed remedial action, 42 U.S.C. § 9611(e)(3) (West Supp. 1992); 40 C.F.R. § 300.425(b)(3) (1992), placement of a federal facility on the national priority list serves only informational purposes. See 54 Fed. Reg. 10,520, 10521 (1989) (EPA Listing Policy for Federal Facilities) ("placing Federal facility sites on the [national priority list] serves an important informational function and helps to set priorities and focus cleanup efforts on those Federal sites that present the most serious problems").

action is underway is confined to CERCLA's ARAR's process.[20] Undoubtedly, CERCLA's ARAR's provision was intended to provide "a mechanism for state involvement in the selection and adoption of remedial actions which are federal in character." Colorado v. Idarado Mining Co., 916 F.2d 1486, 1495 (10th Cir. 1990), cert. denied, 111 S. Ct. 1584 (1991). See also United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1455 (6th Cir. 1991 (ARAR's provisions "reflect Congress' special concern that state interests in the health and welfare of their citizens be preserved, even in the face of a comprehensive federal environmental statute"). Nonetheless, nothing in CERCLA supports the contention that Congress intended the ARAR's provision to be the exclusive means of state involvement in hazardous waste cleanup

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[20] CERCLA provides that "[t]he President shall select appropriate remedial actions determined to be necessary to be carried out under section 9604 . . . which are in accordance with this section, and to the extent practicable, the national contingency plan, and which provide for cost effective response." 42 U.S.C. § 9621(a) (West Supp. 1992). Any hazardous substance remaining on site at the completion of the remedial action may be subject to a level or standard of control equivalent to any federal or state ARAR, including RCRA or state hazardous waste laws. Id. § 9621(d)(2)(A). The President has the authority to waive federal or state ARAR's in selecting a remedial action under certain circumstances. See id. § 9621(d)(4). When the President waives ARAR's with respect to federal facilities, the state may seek judicial review in federal court, limited to the administrative record, to determine whether the President's finding supporting the waiver is supported by substantial evidence. Id. § 9621(f)(3)(B)(i). If substantial evidence does not support the President's finding, a court may modify the remedial action to conform to the ARAR, id. § 9621(f)(3)(B)(ii); however, if the state fails to establish that the President's finding is not supported by substantial evidence, the state may pay the additional cost attributable to meeting the ARAR. Id. § 9621(f)(3)(B)(iii).

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Mor over whil the ARAR provision requi: the Pre: iden .low ta particip a e in remedial planning and revi: and commen: on remedial plans 4 U S C West Supp 1 i only allows tates to ensure compliance with law a the compl: i: of the remedial action See id d (: (A ( )( ) 62 However (a) and d expressly on emplate the applicabi ity of other ederal and ta hazardous was e aws regardl: of whethe CERCLA respons a ion i: underway Given tha RCRA :learly appli: d ing h closure pe :iod of regulated :ility see 4 C F R § 19 id the ARAR provision canno be

the exclusive means of state involvement in the cleanup of a site subject to both RCRA and CERCLA authority

Contrary to the United States' claim, permitting state involvement in hazardous waste cleanup outside of CERCLA's ARAR's process, based on independent state authority, does not render the ARAR's process irrelevant. When a state does not have independent authority over the cleanup of a particular hazardous waste site, the ARAR's provision insures that states have a meaningful voice in cleanup. However, when, as here, a state has RCRA authority over a hazardous waste site, §§ 9614(a) and 9652(d) expressly preserve the state's exercise of such authority regardless of whether a CERCLA response action is underway.[21]

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[21] The United States relies on Idarado Mining and Akzo Coatings to support its claim that the ARAR's provision provides the exclusive means for state involvement in the cleanup of a hazardous waste site where a CERCLA response action is underway. In Idarado Mining, we held that § 9621(e)(2) which authorizes a state to "enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under" CERCLA in federal district court, did not authorize the district court to grant a state injunctive relief in the state's CERCLA response cost action. 916 F.2d at 1494. Unlike Idarado Mining, Colorado here is not seeking to broaden its § 9607 response action authority or § 9621(e)(2) ARAR enforcement authority under CERCLA.

In Akzo Coatings, the Sixth Circuit held that the terms of a consent decree between the EPA and a responsible party "set the parameters of relief available to the state" against the responsible party, and § 9621(f) precluded the state from pursuing alternative state remedies against the responsible party. 949 F.2d at 1454-55. Unlike the state in Akzo Coatings, Colorado is asserting its independent EPA-delegated RCRA authority rather than challenging the selection of a CERCLA remedy.

B.

The United States also argues that to allow Colorado to enforce the final amended compliance order would violate CERCLA's provision that "[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with [§ 9621]. 42 U.S.C. § 9621(e)(1 (West Supp. 1992). While this provision arguably conflicts with §§ 9652(d) and 9614(a) when a state has been authorized to issue and enforce RCRA permits, the facts of this case do not require us to reconcile the potential conflict. The final amended compliance order does not require the Army to obtain a permit. Rather, it merely requires the Army to update its existing RCRA/CHWMA permit application to include all units currently containing Basin F hazardous waste, see Appellants' App. at 101, as required by both RCRA and CHWMA regulations applicable to interim status facilities.[22] See 40 C.F.R. § 270.72(a)(3); 6 Colo. Code Regs. 1007-3 § 100.11(d)(1) (1993). Thus, enforcement

[22] While Basin F lost its interim status on November 8, 1985, because the Army never requested a final Part B permit determination and never certified compliance with applicable groundwater monitoring requirements, see 42 U.S.C. § 6925(e)(2) (West Supp. 1993), the Army is obligated to comply with RCRA and/or CHWMA regulations applicable to interim status facilities pending closure of Basin F pursuant to an approved closure plan. See 40 C.F.R. § 265.1(a) (1992) (standards for interim status facilities "define the acceptable management of hazardous waste during the period of interim status and until certification of final closure"); id. § 265.1(b) (interim status standards "apply . . until either a permit is issued . . . or until applicable . . . closure and post-closure responsibilities are fulfilled). See also 6 Colo. Code Regs. 1007-3 § 265.1(a-b) (1993).

of the final amended compliance order would not violate § 9621(e)(1).

C

The United States also directs us to CERCLA's section governing "[s]ettlements," 42 U.S.C. § 9622 (West Supp. 1992), and specifically its provision, within the "[s]pecial notice procedures" subsection, entitled "[i]nconsistent response action." Id. § 9622(e)(6). This provision states that

> [w]hen either the President, or a potentially responsible party pursuant to an administrative order or consent decree under [CERCLA], has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

Id. While the relevance of § 9622(e)(6) to the present case is unclear, the United States relies on the EPA's interpretation of this provision in a policy statement concerning the listing of federal facilities on the national priority list. See 54 Fed. Reg. 10,520 (1989). In the course of discussing why it would not apply its policy of deferring placement of RCRA-subjected sites on the national priority list to federal facilities, the EPA recognized that when it undertakes a CERCLA response action at a site subject to state-delegated RCRA authority, a conflict may arise "from the overlap of the corrective action authorities of the two statutes." Id. at 10,522. The EPA takes the position that § 9622(e)(6) gives the EPA final authority over the remedy when the conflicting views of the EPA and a RCRA-authorized state cannot be resolved in regard to a site where a RI/FS has been

initiated. Id. at 10,523. In the EPA's view, § 9622(e)(6)'s authorization requirement applies, not only to a potentially responsible party's independent remedial action, but also to any action by a party which has been ordered by the state under its RCRA authority "as both types of action could be said to present a potential conflict with a CERCLA authorized action." Id. Thus, in the case of a conflict between the EPA and the state, § 9622(e)(6) authorizes the EPA to withhold authorization to a potentially responsible party from going forward with a RCRA corrective action ordered by the state. Id. Not surprisingly, the United States argues for deference to the EPA's interpretation of § 9622(e)(6). See Hill v. National Transp. Safety Bd., 886 F.2d 1275, 1278 (10th Cir. 1989).

The EPA's interpretation of § 9622(e)(6) has several problems, not the least of which is that it permits the EPA to preempt state law contrary to § 9614(a) and to modify a responsible party's obligations and liabilities under state RCRA programs contrary to § 9652(d). Section § 9622(e)(6) makes absolutely no mention of RCRA-authorized state actions, and it seems highly suspect that Congress intended this provision which is buried within a subsection entitled "notice provisions" in a section addressing settlements with private responsible parties to resolve conflicts between state-RCRA laws and CERCLA response actions. See H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 100 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2882 (§ 9622 was

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Moreover applying th EPA in erpre tion ( ) ( o ederal fa ili es i ontrary he pl in languag of CERLCA on spe ifically addre ing ederal cili ies U C Wes upp ) Congre expres ly provided within he ederal ili ies ec ion tha [n] thing in this ct on hall ct or impair the obligation f any department ency or ins rumental ty the Uni ed tates comply with any equi emen [RCRA (including corre ive tion requirement Id i Whi the EPA ake the posi ion ha its in rpreta on e is not in onsis en with 62 bacaus RCRA requiremen an be chieved through the ARAR proc pursuan 1 d ( ) Fed Reg a 1 the ARAR proces annot be the exclusive means a RCRA authorized ta involvement in the leanup of a RCRA regula ed ite becaus therwise a party obliga ions under other ederal and ta e hazardous was aws would be modi ed during the closure period con rary o d and ta la would be preempted contrary ( See supra By the same reasoning if the ARAR pro es consti uted ta sole means of enforcing its RCRA program ederal acility the ederal agency' RCRA ob iga ons p ior completion of the CRRCLA remedial action would be f cted or impaired contrary to the plain language § 962 i See H R Rep No 53 ) reprinted in 19 U S C C A N a 7 ederal facili ies section provides the

public, states, and [the EPA] increased authority and a greater role in assuring the problems of hazardous substance releases are dealt with by expeditious and appropriate response actions"

Finally, § 9622(e)(6) is triggered by the initiation of a RI/FS. The federal facilities provision requires federal agencies to commence a RI/FS within six months after the facility is included on the national priority list, 42 U.S.C. § 9620(e)(1 (West Supp. 1992), and commence a remedial action within fifteen months of the study's completion, id. § 9620(e)(2), while at the same time providing that this section does not affect or impair the agency's RCRA corrective action requirements. Id. § 9620(i). Certainly, Congress could not have intended to require a RI/FS and RCRA compliance in one section while at the same time barring RCRA compliance when a RI/FS is initiated in another section. As summed up by one commentator, "if placement on the [national priority list], completion of a RI/FS, and initiation of remedial action pursuant to [§ 9620] does not impair RCRA obligations, mere initiation of the required investigation cannot have this effect." Joseph M. Willging, Why the EPA's Current Policies on Potential CERCLA-RCRA Authority Conflicts May be Wrong, 1 Fed. Facilities 69, 82-83 (Spring 1990)

Because the EPA's interpretation of § 9622(e)(6) is "contrary to the plain and sensible meaning" of §§ 9622, 9614(a) and 9652(d), and, when applied to federal facilities, § 9620, we do afford it any deference. Hill, 886 F.2d at 1278 (quotations omitted). In our view, § 9622(e)(6) does not bar a state from

exercising its EPA-delegated RCRA authority at a federal facility where a RI/FS has been initiated.

VIII.

We REVERSE the district court's grant of summary judgement for Plaintiff-Appellee, the United States. We REMAND to the district court with instructions to VACATE the order prohibiting Defendants-Appellants, Colorado and CDH, from taking any action to enforce the final amended compliance order and for further proceedings consistent with this opinion.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ENFORCEMENT

July 9, 1993

MEMORANDUM

SUBJECT: Deadline for Filing Rocky Mountain Arsenal

FROM: Sally M. Dalzell
Office of Federal Facilities Enforcement

TO: Steven A. Herman
Assistant Administrator

The deadline for filing the petition for certiorari to the Supreme Court runs 90 days from June 30th; therefore, the deadline is September 28th.

We should be receiving this morning a copy of the 10th Circuit's amended decision from the Justice attorney in Colorado. Upon receipt, we will ensure that you receive a copy.

cc: Thomas L. McCall, Jr
Scott C. Fulton
Robert Van Heuvelan
Gordon M. Davidson
William White
Barry Breen

Urgent to T. McCall

Jack
Bob

**SPECIAL AND CONFIDENTIAL** From B Carr 7/8/93

I. 3:30 PM news:
The Army has just told me they have decided to shut down SQI today for an indefinite period, and are so announcing to the press now. The (unstated?) reasons are: 1) that explained below in item II.; and 2) that the Army and DOJ attorneys have considered that the revised Appeals Court opinion indicates that RCRA authority may follow the waste, not the unit, and therefore their personnel may have personal liability for operating without a RCRA permit. Given that concern, restartup is now expected to await resolution of that legal issue - or some very comforting arrangement with the state.

The press release (attached) announces the shut down SQI, "for scheduled routine maintenance" and also mentions the revised Appeals Court opinion.

II. news from this AM (somewhat superceded by the above item I.) re Looby's concern over continued operation of the SQI prior to receipt and evaluation of trial burn data:

Jeff Edson reported today at the Committee meeting:
- Mayor Webb's office is pressing Gov. Romer to sign a joint letter asking for shut down pending the data

the Gov. is visiting CDH to see the monitor this afternoon, and Jeff expects a decision on a state position will be made then

- Looby expected the pending 7/15 public briefing to address data from the trial burn; since it will only address the mini-burn data,* Jeff expects Looby will have increased frustration and concerns

Jeff repeated that this is a political issue, not a technical one. The expectation is that Looby or Romer may place calls today or tomorrow to Army (and EPA?) on the matter.

I suggested to Doc this AM that they continue with the 7/15 miniburn public briefing, but pledge to Looby to do another as soon as the trial burn data is available (not waiting for the report to be written). I would also suggest that we (Bob?) offer to Teresa an EPA briefing on why we think we should have continuous operation - had not the Army taken the item I. action.

Connally

* At the SAPC, people heard different things. Looby thought the Army then - and later in his call to D. Walker - committed to brief the public on the trial burn data soon. The Army asserts